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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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National Exchange Carrier Association, Inc.	)	RM No. 10603
	)	
Petition to Amend Section 69.104 of the Commission's Rules	)	
	)	
	)	

AT&T OPPOSITION TO JOINT PETITION FOR EXPEDITED WAIVER

Pursuant to the Commission's August 26, 2003 Public Notice (DA 03-2732), AT&T Corp. ("AT&T") opposes the petition of various telephone industry groups (collectively, "the Associations") for an expedited interim waiver of section 69.104 of the Commission's rules to reduce the number of End User Common Line ("EUCL") charges carriers must assess on customers ordering channelized T-1 service.[1] The joint petitioners seek an interim waiver of this rule while the Commission considers amending the rule in response to the Petition for Rulemaking filed by the National Exchange Carrier Association ("NECA") on September 26, 2002.[2]

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1 *National Exchange Carrier Association, Inc. Petition to Amend Section 69.104 of the Commission's Rules*, RM 10603, Joint Petition for Expedited Waiver (filed Aug. 19, 2003) ("Petition"). The Joint Petitioners are Eastern Rural Telecom Association, Independent Telephone and Telecommunications Alliance, John Staurulakis Inc., Matanuska Telephone Associations, Inc., National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, TDS Telecom, United States Telecom Association, and Western Alliance.

2 Petition for Rulemaking, *National Exchange Carrier Association, Inc. Petition to Amend Section 69 104 of the Commission's Rules*, RM No. 1060 (filed Sept. 26, 2002).

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NECA's Petition asked the Commission to amend section 69.104 to permit no more than five EUCL charges to be assessed on customer-ordered exchange access service that is provisioned using high-capacity T-1 interfaces when the customer supplies the terminating channel equipment (*i e ,* digital transport service or "DTS"). NECA contends that this rule change is needed for rates to more closely reflect the actual common line costs incurred and would ensure equivalent application of EUCL charges upon DTS and ISDN services. Noting that the Commission has yet to take any action on NECA's petition, the Associations now request the Commission to grant a limited waiver of section 69.104 pending resolution of the issues to be addressed in the proposed rulemaking.

The Associations contend that the Commission's current access charge rules require telephone companies to overcharge customers of these channelized T-1 services (Petition at 1). However, what the Associations are really seeking, as they ultimately concede, is to *shift* the recovery of costs from EUCL charges paid by business end-users to the Interstate Common Line Support ("ICLS") fund paid for by telecommunications users in general (Petition at 8-9).[3] Indeed, if the Associations' constituent telephone companies sought only to reduce certain EUCL charges, they could do so *voluntarily* without a rule change or waiver, but then these companies would not be able to finance those reductions through the ICLS subsidy mechanism.

The central issue raised by this petition thus is *not* whether certain EUCL charges are excessive and should be reduced, but rather whether the recovery of common line costs should be shifted from end users to the ICLS subsidy mechanism. As demonstrated below, the Associations have failed to meet their burden of demonstrating that such action would be

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[3] Petition at 8-9.

in the public interest and is essential in order to prevent irreparable hardship. Accordingly, their waiver request should be promptly denied.

I. THE ASSOCIATIONS HAVE FAILED TO SATISFY THEIR BURDEN OF DEMONSTRATING THAT A WAIVER IS NECESSARY.

The Court of Appeals has cautioned that the Commission should not "tolerate evisceration of a rule by waivers."[4] As the Commission has previously recognized, this is precisely the prohibited result that would follow where virtually any carrier subject to a rule could at some time qualify for such relief[5] Accordingly, a petitioner must show that special circumstances exist such that a waiver of a valid Commission rule is appropriate, and that grant of the waiver is in the public interest.[6] The Associations have failed to meet this burden.

According to the petition, current EUCL charges for customer-ordered exchange access service provisioned using high capacity T-1 interfaces for which the customer supplies the terminating channelization equipment ("channelized T-1 service") "are not aligned with costs and therefore impose overcharges on the customers of these services" (Petition at 2). The Associations contend that customers "are saddled with SLC burdens that far exceed the NTS loop costs of the service provided" (Petition at 3). If true, this would be potentially an industry-wide problem that must be addressed through a rulemaking rather than a blanket rule waiver.

Moreover if, as the Associations contend, the application of the full complement of SLCs to channelized T-1 services results in excessive charges on customers, the remedy is

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4 *WAIT Radio v FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1968), *cert denied*, 409 U.S. 1027 (1972).

5 *See, e g , National Exchange Carrier Association (Petition for Waiver),* 3 FCC Rcd. 6042, ¶ 8 (1988) (denying waiver of equal access cost recovery rules where "a waiver for 1300 [NECA] carriers would effectively undermine the validity of the rule.")

6 *Wait Radio, supra.*

straightforward and requires neither a rule change nor a waiver. As AT&T showed in its Opposition to NECA's Petition for Rulemaking, carriers are permitted to make voluntary reductions to their EUCL charges for channelized T-1 service, so long as they do not attempt to collect the foregone revenues from other carriers through CCL charges or through universal service support mechanisms.[7] Moreover, because the major component of the total price of local exchange services consists of charges tariffed in the intrastate jurisdictions, if interstate charges are deemed to be excessive, carriers always have the option of reducing their intrastate rates for the service in question.

Regardless of whether interstate or intrastate charges are reduced, the impact on carriers' revenues is likely to be relatively small in relation to their total revenues. NECA's estimate is that the reduction in EUCL revenue resulting from the waiver would be approximately \$13 million per year, a reduction of only 1.4% in total EUCL revenues. This reduction would be partly offset by estimated port revenues of \$1.5 million, resulting in a net reduction of only \$11.5 million for the entire rate-of-return LEC industry (Petition at 8 & n.22) – a figure that amounts to less than 0.4% of the carriers' interstate access revenues of approximately \$3 billion.[8] According to the preliminary Form 492 reports filed by local exchange carriers for the 2001-2002 monitoring period, many of the rate-of-return companies realized interstate earnings in excess of the authorized 11.25% rate-of-return, with some of the

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7 Opposition of AT&T Corp., RM No. 10603, filed May 30, 2003, at 4. *See* 47 C.F.R. § 69 104(q) ("In the event a non-price cap local exchange carrier charges less than the maximum End User Common Line charge for any subscriber lines, the carrier may not recover the difference between the amount collected and the maximum from carrier common line charges, Interstate Common Line Support, or Long Term Support.")

8 Estimated by AT&T from the rate-of-return carriers' TRP (Tariff Review Plan) data.

returns well above 20%.[9] These companies could easily reduce their rates for channelized T-1 service and still continue to realize earnings above the 11.25% benchmark. These are scarcely the type of circumstances that would warrant granting a blanket waiver.

II. A WAIVER WOULD NOT BE IN THE PUBLIC INTEREST.

Although the Associations emphasize the need to reduce EUCL charges on channelized T-1 services (which, as shown above, could readily be accomplished by a voluntary reduction), in actuality their proposal is to *shift* the recovery of common line costs from EUCL charges to the Interstate Common Line Support mechanism – a fact that is acknowledged only briefly near the end of the petition (Petition at 8-9). The petition makes absolutely no attempt to explain why the increase in ICLS payments is essential in order to prevent petitioners from experiencing any unique hardship. Instead, the estimated $11.5 million increase in support from the ICLS mechanism is casually dismissed as "extremely small in comparison to the total size of the universal service fund…" (Petition at 9).

The Commission, however, cannot be quite so casual about authorizing increases in ICLS payments, having recognized the urgent need to reduce the burden on the Universal Service Fund ("USF"). As the Commission has acknowledged, wireline interstate telecommunications revenues have begun to shrink dramatically over the past couple of years, while universal service funding has increased and the USF contribution factor has swelled. The revenue assessment base continues to decline, driven by the substitution of wireless for wireline long distance, the growth of non-telecommunications long distance substitutes such as e-mail and instant messaging, and the "leakage" created as higher and higher contribution

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9 *See* AT&T, Notice of *Ex Parte* Presentation, CC Docket Nos. 00-256, 96-45, 98-77 and 98-166, Exhibit 1, May 9, 2003.

factors induce customers and their providers to structure contracts that bundle interstate telecommunications services with intrastate services, information services, and customer premises equipment to minimize the revenue attributed to interstate telecommunications services. As a result, the USF is in a "death spiral" that pushes revenues out of the assessment base, and results in ever increasing USF recovery line items for consumers. For these reasons, the Commission has on at least two occasions undertaken to "stabilize" the USF contribution factor[10] or taken other interim steps "to maintain the viability of universal service in the near term" while it completes a pending proceeding to reform the entire system.[11]

Having recognized the need to *reduce* the burden on the USF and the critical need to revamp the universal service system, it would highly *inappropriate* for the Commission to grant the proposed waiver, particularly when the Associations have adequate alternative remedies, such as voluntary EUCL reductions that would not only solve their consumer concerns, but would help ameliorate common line overearnings. Commission action that would have the effect of increasing USF funding requirement should be taken only on the basis of a complete record and thorough examination of the issues. Any claim that would result in additional USF funding needs to be evaluated in light of other potential competing claims for the limited amount of USF funds available. The Commission must also weigh the possibility that funding requirements associated with such claims could increase over time.[12]

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10 *See Schools and Libraries Universal Support Mechanism*, First Report and Order, 17 FCC Rcd. 11,521, ¶¶ 1, 3 (2002).

11 *See Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, 98-171, 90-157, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, ¶ 1 (Dec. 13, 2002).

12 If, as the petition suggests (at 4), the current rules discourage rural businesses from ordering high capacity services, then changing (or waiving) the rules could result in significantly greater demand for those services and increased ICLS funds to offset the shortfall in EUCL revenue.

The Commission cannot routinely grant waivers that have the effect of increasing the USF and result in ever increasing USF contribution factors without further eroding the viability of the fund.

The Associations have not made even the slightest attempt to demonstrate that their members would suffer hardship if the ICLS fund were not increased to accommodate their request. If, however, there were any merit to their proposal to shift revenues from EUCL charges to the ICLS mechanism, the Commission should first complete the rulemaking requested by NECA. Since petitioners have failed to show that they would experience any undue hardship pending the completion of such a rulemaking, it would be highly premature to grant their waiver request.

CONCLUSION

WHEREFORE, for the reasons stated above, the Associations' petition for a waiver should be denied.

Respectfully submitted,

AT&T CORP.

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September 25, 2003

CERTIFICATE OF SERVICE

I, Judy Sello, do hereby certify that on this 25th day of September, 2003, a copy of the foregoing "AT&T Opposition to Joint Petition for Expedited Waiver." was served by U.S. first class mail, postage prepaid, on the parties shown on the attached Service List.

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